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SUPREME COURT, U. S.

In the Supreme Court of the United States

OCTOBER TERM, 1969

JAMES RODNEY JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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No. 1215

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of Oklahoma, petitioner and one Reid were convicted of burglary of the United States Post Office in Towson, Oklahoma, in violation of 18 U.S.C. 2115. Petitioner was sentenced to three years' imprisonment. The court of appeals affirmed (Pet. App.).

1. Petitioner's principal challenge is to the denial of his pre-trial motion to suppress evidence of a small

box containing money and an iron bar, taken from the automobile in which he and Reid were found at the time of their arrest. As related in the opinion below (Pet. App. ii-iii), the evidence developed at the hearing on the motion to suppress showed that the post office in Towson, Oklahoma, was burglarized on the night of March 9-10, 1968. The next morning, in Paris, Texas, approximately 40 miles from Towson, Lieutenant Chamberlain and Patrolman Long of the Paris police department, while on routine patrol duty, observed an automobile with expired Arkansas license plates [1] parked in a city recreation area. The officers approached the car and told petitioner and Reid, who had been asleep inside (petitioner was in the front and Reid was in the rear), that they would have to accompany the officers to the police station because of the expired license. One of the officers testified that Reid and Jones were placed under arrest at that time while they were in the car. Lieutenant Chamberlain asked the men what was in the glove compartment. One of them said that there was a cigar box full of money. At Chamberlain's request petitioner opened the glove compartment, showed the box to the officers, and then returned it to the glove compartment. The officers thereupon directed petitioner and Reid to get out of the car, and they were frisked for weapons. When the front door was opened, the officers saw some heavy tools, including an iron bar, on the floor. A further exami-

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[1] This was an offense under Arkansas law. See Sec. 75-201(l), Ark. Stat. Ann. (1947).

nation of the vehicle uncovered two revolvers underneath the front seat.

Petitioner, Reid, and the automobile were then taken to the police station, where the box containing money and the tools were removed. At trial the cigar box (which had been taken from the burglarized post office) and the iron bar (which an expert testified had been used to open the post office safe) were introduced into evidence.

There is no support in the record for petitioner's contention that there was an unlawful search of the car which revealed the cigar box and iron bar, and that the traffic arrest was utilized as a mere pretext to search. The evidence shows that the officers' request to have the glove compartment opened was a usual and necessary measure for their own protection against concealed firearms (See Pet. App. ii, n.2). The fact that the incriminating contents of the box were disclosed did not make the officers' request unreasonable or prevent the later seizure of the box. See *Terry* v. *Ohio*, 392 U.S. 1; *Chimel* v. *California*, 395 U.S. 752; *Welch* v. *United States*, 361 F. 2d 214 (C.A. 10), certiorari denied, 385 U.S. 876. Similarly, since the officers had a right to be in the position they were when the door of the car was opened, revealing the tools on the floorboard, the subsequent seizure of the iron bar was lawful. See *Harris* v. *United States*, 390 U.S. 234.

2. Petitioner also argues that there was prejudicial comment on his failure to testify in the following statement in the prosecutor's summation: "Now

they [counsel for defendants] haven't told us how the defendants got the box marked 'Old Fort' [the cigar box] yet * * *" (Pet. 15). An objection was sustained by the trial judge on the ground that it was a comment on the failure of the defendants to testify, but a motion for mistrial was denied.[2] Thereafter the court instructed the jury that the defendants' failure to take the stand could not be considered as showing their guilt. It is clear, as the court below held, that the prosecutor's remark was not intended, nor would the jury interpret it, as constituting a comment on the defendants' failure to testify. It did not require testimony by petitioner or his co-defendant for defense counsel to furnish a theory to explain the presence of the cigar box filled with money in the car. There was, therefore, no prejudice in these circumstances justifying a new trial.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1970.

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[2] The court of appeals indicates in its opinion that no such motion was made (Pet. App. iv). The court, however, did not rely on this assumed lack of a motion for mistrial in reaching its conclusion that the comment was not prejudicial.

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